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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 649

MARGARET LAYNE, Executrix of the Estate of William J. Layne, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX

OPINION OF THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 13318

October 16, 1961

Before Hastings, *Chief Judge*, and Knoch and Kiley, *Circuit Judges*.

Knoch, *Circuit Judge*. Plaintiff, Margaret Layne, Executrix of the Estate of William J. Layne, Deceased, sued under the Federal Tort Claims Act [Title 28, U.S.C.A. Sec. 1346(b)] to recover damages for his wrongful death.

The Complaint alleged that on July 2, 1959, the decedent, Major Layne, a member of the Indiana Air National Guard, while the pilot of an F-84-F jet fighter aircraft on a training flight, was fatally injured through the negligence of civilian employees of the United States at Hulman Field, Terre Haute, Indiana, where the control tower and all facilities, including safety devices operable from the control tower, were in the exclusive control of the United States, acting through its civilian employees.

The United States moved for summary judgment in its favor on the ground that Major Layne died from a service

connected disability incurred in the active air service of the United States in peacetime (for which Mrs. Layne was receiving compensation pursuant to the provisions of the Veterans' Benefits Act [Title 38 U.S.C.A. Secs. 101, et seq.]) which precluded recovery under the Federal Tort Claims Act. Affidavits, exhibits, and stipulations of the parties were submitted in support of and in opposition to this motion.

The District Court found no genuine issue as to any material fact, and granted the motion for summary judgment, in favor of the United States, from which Mrs. Layne took this appeal.

The pertinent facts may be summarized as follows: Major Layne was in the active service of the Indiana Air National Guard. Both the Guard and Major Layne, individually, were recognized by the United States as part of the reserve components of the United States military establishment, classified as "inactive service." At the time of the injury out of which this case arises, Major Layne was on a duty training flight.

Neither counsel, the District Court, nor this Court, have found any published decision relating to the right of a member of the National Guard to maintain an action against the United States under the Federal Tort Claims Act.

Members of the armed forces of the United States on active duty may not maintain an action against the United States under the Act. In *Feres v. United States* (1950), 340 U. S. 135, the Supreme Court said (at page 146):

> " " (T)he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arose out of or are in the course of activity

> incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence.

In a carefully reasoned opinion the learned District Judge traced the history of the National Guard in the United States, from the authority for its existence in the Constitution, Art. 1, Sec. 8 (1787), through its implementation in The National Guard Act, Title 32, U.S.C.A., the amended 1851 Constitution of the State of Indiana, Art. 12, Secs. 1-5, the Indiana Military Code, Chap. 187, Burns' Indiana Statutes, Secs. 45-1801 through 45-2805 (1953). From a close study of these Constitutions and statutes, the District Judge concluded that Major Layne held a dual legal relationship to the United States and to the State of Indiana at all pertinent times in question. Both Constitutions empower the United States and the State to create and maintain a National Guard and its personnel. Thus Indiana National Guard members may be in the "active" or "inactive" service of the respective State and National governments. The District Judge found that:

> Major Layne was a commissioned officer who took an oath of office prescribed by both the national and state laws to support and defend the National Constitution against all enemies, foreign and domestic, bear true faith and allegiance to it, obey the orders of the President of the United States, and that he would well and faithfully discharge the duties of his office. Major Layne was at the time in question a part of the reserve components of the defendant's military establishment. Major Layne qualified for and received a regular pay

allowance from the defendant under the said national laws. Title 31 U.S.C.A. 698. Major Layne was qualified for and his surviving dependents received the pension and other benefits under said national laws. Title 38 U.S.C.A. 101. With the foregoing factors and others prescribed in the said laws, it cannot be said that the term "Inactive Service" means that he was not in the service of the defendant at the time in question, even though he was at the time following the orders or command of the State of Indiana in his described dual relationship.

Plaintiff relies on a line of cases[1] which involve injured civilians who seek to recover under the Federal Tort Claims Act for negligence of National Guardsmen on inactive duty. The District Court distinguished these cases as holding that the United States is not responsible for the alleged negligent National Guardsmen under the rule of *respondeat superior* because in those cases the National Guardsmen were not employees of the United States.

We agree that the distinction is a valid one. In dealing with the two concepts the Ninth Circuit said:

> * * * (T)he test here is whether the injured serviceman was engaged in "activity incident to service"

[1] Plaintiff relies principally on *Williams* v. *United States* (10 Cir., 1951), 189 F. (2d) 607; *Dover* v. *United States* (5 Cir., 1951), 192 F. (2d) 431; *McCranie* v. *United States* (5 Cir., 1952), 199 F. (2d) 581; *MacKay* v. *United States* (D. C., Conn., 1949), 88 F. Supp. 696; *Glasgow* v. *United States* (D. C., N.D. Ala., 1951), 95 F. Supp. 213; *Leary* v. *United States* (D. C., N.H., 1960), 186 F. Supp. 953. Plaintiff also cites *Elmo* v. *United States* (5 Cir., 1952), 197 F. (2d) 230. In that case it was stipulated that the National Guardsman accused of negligence was also employed as a civilian unit caretaker of United States government property. The Court there held that in the capacity of caretaker the National Guardsman was a United States employee within the meaning of the Federal Tort Claims Act.

> at the time he was injured. That this is a much broader test than the "scope of employment" test used for *respondeat superior* purposes is clear from the facts of the *Feres* case itself and from the numerous circuit court cases which have interpreted and applied *Feres*. (Callaway v. Garber (9 Cir., 1961), 289 F. (2d) 171)

The cases cited by Plaintiff do not negative the dual relationship of a National Guardsman, who may at a given time be in the exclusive service of the State, or, as in the case before us, in the dual capacity of serving both United States and State governments.

The District Judge reasoned that:

> In this case, Major Layne at the time in question was performing limited service of the United States of America in a military status even though he was also executing at the same time the commands of the State of Indiana; received pay from the United States of America for the training flight in question even though he was executing at the same time the commands of the State of Indiana; operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana; and his dependent survivors received pensions and other benefits by reason of his death occurring in a service-connected accident even though he was executing at the same time the commands of the State of Indiana. Under the said laws, Major Layne was not in the same non-service status with the United States of America as that of a non-military private citizen of this country. The fact that the United States of America was not exercising its entire power of command or control of Major Layne at the time in question does not remove or destroy the performance of service for and

> the status relationship the Major had with the United States of America, or it with the Major at the time in question. Nor does the fact that Major Layne's status is termed "Inactive Service" mean that he is not in or performing any service. The whole law must be read together to ascertain the meaning of such term which unerringly points to the service status of Major Layne and that in the line of duty, under these facts, (he) was injured and became a casualty incident to such service with the United States of America.
>
> Major Layne's accident occurred in the line of duty and incident to his service with the United States of America, * * *. *Feres v. United States of America, supra; Richard W. Buer v. United States of America*, 241 F. (2d) 3.

Plaintiff argues that the District Court erred in holding that receipt of federal statutory benefits precluded action under the Federal Tort Claims Act, citing *Brooks v. United States* (1949), 337 U. S. 49, 93 L. Ed. 1200; *United States v. Brown* (1954), 348 U. S. 110, 99 L. Ed. 139; *Archer v. United States* (1954), 217 F. (2d) 548. Neither *Brooks* nor *Brown* involved injuries incurred as an incident to military service. The benefits received in the instant case were predicated in part on a finding by the Veterans' Administration that Major Layne's death was service-connected. In *Archer*, the Court did say, at page 551:

> It is by no means established that the claim or acceptance of benefits under the statutes for service men and their dependents tends to establish a waiver or estoppel against pursuing a remedy under the Tort Claims Act, if *one existed*. (emphasis added)

But the Court in *Archer* concluded:

> The Trial Court was undoubtedly correct in holding

> that a cadet riding under military discipline on an army plane under control of a superior officer has no claim under the Act for injury sustained through whatever cause. This principle would not vary even though the service man were on leave and whether he were on the plane voluntarily or by command. He was in line of duty. Under such circumstances, his parents could not recover for his death. * * * Undoubtedly, under the situation disclosed by the record, plaintiffs have no right against the United States. * * * (T)he complaint did not state a cause of action or a claim upon which relief could be granted.

Other arguments advanced on behalf of plaintiff have been considered and found to be lacking in merit. The judgment of the District Court is AFFIRMED.

OPINION OF THE DISTRICT COURT

The defendant's Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure presents the issues.[2] The defendant offered affidavits and exhibits in support of the Motion and the plaintiff offered an affidavit, stipulations of the parties, and exhibits in opposition to the Motion.

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2 "MOTION FOR SUMMARY JUDGMENT

* * *, defendant herein moves the Court for summary judgment in its favor for the reason that plaintiff's decedent, William J. Layne, died from a service-connected disability incurred in the active air service of the United States in peacetime, for which the plaintiff is being compensated pursuant to the provisions of the Veterans' Benefits Act (Sections 101, et seq., Title 38, United States Code), which, in accordance with judicial precedent in such cases, precludes additional or further recovery by the plaintiff under the Federal Tort Claims Act for the same service-connected disability and death.

* * *."

Appendix

The plaintiff, administratrix of the estate of William J. Layne, deceased, brings this action based on the Federal Tort Claims Act, 28 U.S.C.A. 2671 et seq.[3] She alleges that

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3 "COMPLAINT FOR DAMAGES

* * *.

3. That on the 2nd day of July, 1959, William J. Layne, deceased, was the pilot of a certain airplane, to-wit: F-84-F jet fighter, at Hulman Field, Terre Haute, Indiana.

4. That at all times mentioned herein, the duty of operation, management and control of the control tower at said Hulman Field, Terre Haute, Indiana, and the duty of supervising, operating and providing for air navigational traffic and safety for persons rightfully using the airplanes and facilities, both civilian and military, at said Hulman Field, Terre Haute, Indiana, and in particular said William J. Layne, deceased, had been entrusted to and assumed by said Defendant, and said Defendant had agreed to and did undertake said duties.

5. That at all times mentioned herein the control tower at said Hulman Field, Terre Haute, Indiana, and all of the facilities, safety devices, and instruments, including a certain safety barrier, which were operable from said control tower, were in the exclusive custody, control and possession of the Defendant, by and through its agents, servants and employees. That at all times mentioned herein, said agents, servants and employees of the Defendant were acting within the scope of their employment with said Defendant.

6. * * *. That said safety barrier was installed at the end of the runway at said Hulman Field as a safety device, for the protection and preservation of life and property, in such a manner that aircraft, which had experienced mechanical or operational failures on take-off attempts could be caught with said safety barrier and brought to a safe stop before crashing. That at all times mentioned herein, said safety barrier was capable of performing said functions and of bringing any such aircraft to a safe stop. That said Defendant agreed and covenanted to operate and raise said safety barrier when requested and ordered to do so by pilots using said facilities at Hulman Field, Terre Haute, Indiana, including said William J. Layne, deceased.

7. That on the 2nd day of July, 1959, and at approximately 5:45 P.M. on said date, said William J. Layne, deceased, attempted to take off from said runway at said Hulman Field, Terre Haute, Indiana, in the aforesaid airplane. That at said time and place and as said deceased was attempting the take-off, as aforesaid, said airplane sustained a blow-out to one of the tires, thereby causing said deceased to lose control of said airplane. That at said time, said deceased immediately requested and ordered that said safety barrier be raised and sent an

the United States of America is liable in damages to the estate for the use and benefit of certain dependent survivors of Major William J. Layne; that he was injured and died while in a training flight as a member of the Indiana Air National Guard which was proximately caused by the alleged negligent conduct of defendant's civilian employees in the operation of an air traffic control tower at Hulman Field, Terre Haute, Vigo County, Indiana.

The defendant's amended answer consists of five (5) defenses, the first (1st) and fifth (5th) of which are material to this Motion.[4] The first (1st) defense admits and

urgent appeal and order by radio to the agents, servants and employees of said Defendant in said control tower, for emergency aid, and specifically requesting the raising, use and operation of said safety barrier. That said Defendant, well knowing of the perilous situation of said William J. Layne, deceased, and after having received said urgent appeal, request, and order for use and operation of said safety barrier, negligently failed and refused to use or raise said safety barrier. That as a direct and proximate result of the negligence of the Defendant, the airplane which said William J. Layne, deceased, was then operating crashed and burst into flame, thereby causing the death of said William J. Layne, to Plaintiff's great damage.

8. * * *.

9. . That said William J. Layne departed this life, leaving his widow and two (2) minor sons, William Dean Layne and Jerry Lee Layne, surviving him, which widow and minor sons were wholly dependent on said deceased for support. That as a direct and proximate result of the negligence of the Defendant, the Plaintiff has been damaged in the sum of Five Hundred Ninety-Five Thousand ($595,000.00) Dollars.

* * *"

[4] "AMENDED ANSWER

Defendant, UNITED STATES OF AMERICA, * * *:

FIRST: * * *.

SECOND: Admits the allegations contained in paragraph numbered '3' of the complaint.

THIRD: Denies each and every allegation contained in paragraphs numbered '4', '5', '6', '7', * * *, and '9' of the complaint.

denies pertinent allegations of the complaint. The fifth (5th) defense alleges that the dependent survivors sought and obtained an award from defendant for dependency and indemnity compensation under the provisions of Title 38 U.S.C.A. 301 (The Servicemen's and Veteran's Benefit Act).

There is no genuine issue as to any material fact. Major Layne at all times in question was a member of and in the active service of the Indiana Air National Guard, assigned to the 113th Tactical Fighter Squadron based at Hulman Field, Vigo County, Terre Haute, Indiana. The Indiana Air National Guard and Major Layne at all times in question had met all the requirements for and were recognized by the United States of America as a part of the reserve components of its military establishment in a classification of "Inactive Service." Major Layne at the time in question was on a duty training flight. During the take-off, he met with an accident and subsequently died as a result of injuries incurred in the accident. Surviving dependents of Major Layne sought, were awarded, and received death pension and other benefits from the United States of

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* * *
* * *

AS AND FOR A FIFTH SEPARATE AND COMPLETE DEFENSE

Plaintiff herein has previously made application to this defendant for dependency and indemnity compensation as the result of the death of her husband in this accident, and such compensation for service-connected injury and death has been awarded and paid to her pursuant to the provisions of the Servicemen's And Veteran's Benefit Act, 38 U.S.C. 301, et seq. The compensatory relief thus already provided plaintiff pursuant to statutory enactment precludes her further recovery in this action under the Tort Claims Act."

America as authorized by Title 38 U.S.C.A. 101(24) as a result of such happening in the course of such military service.

The Federal Tort Claims Act, Title 28 U.S.C.A. 2671 et seq., makes the United States of America liable for money damages for death caused by the negligent act or omission of any of its employees while they are acting within the scope of their office or employment or in the case of the military in line of duty under circumstances where the United States of America, if a private person, would be liable to such claimant under the law of the place the negligence occurred. The Act is compensatory in nature and is in no way punitive. Jurisdiction to hear such claims, pursuant to the Federal Tort Claims Act, is expended by authority of Title 28 U.S.C.A. 1346(b).

The United States Supreme Court has held that a member of the armed forces of the United States of America performing on active duty cannot maintain an action against the United States of America under the Federal Tort Claims Act. Feres v. United States of America, 340 U. S. 135, 71 Sup. Ct. 153, 95 L. Ed. 152. No published decision is known to the Court involving a National Guardsmen's claim under such Act.

The authority for the existence of the National Guard is in the 1787 Constitution of the United States of America. It provides in Article 1, Section 8:

> "The Congress shall have Power To * * * provide for the common Defence * * * of the United States, * * *; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *; and
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any department or Officer thereof."

Implementing such Constitution for the United States of America are the Acts of Congress being Title 32 U.S.C.A. (The National Guard Act). This code demonstrates the relationship of the National Guard of Indiana and its members with the United States of America.

Further authority for its existence is in the amended 1851 Constitution of the State of Indiana. It provides in Article 12:

> "Section 1. Organization.—The Militia shall consist of all able-bodied male persons, between the ages of eighteen and forty-five years, except such as may be exempted by the laws of the United States, or of this state; and shall be organized, officered, armed, equipped, and trained, in such manner as may be provided by law."
>
> "Section 2. Governor's Aids.—The Governor shall appoint the Adjutant, Quartermaster, and Commissary Generals."
>
> "Section 3. All militia officers shall be commissioned by the Governor, and shall hold their offices not longer than six years."

"Section 4. Division of Militia.—The General Assembly shall determine the method of dividing the militia into divisions, brigades, regiments, battalions and companies and fix the rank of all staff officers."

"Section 5. Sedentary and active.—The Militia may be divided into classes of sedentary and active militia, in such manner as shall be prescribed by law."

"* * * *"

Implementing the Constitution of the United States of America, Title 32 U.S.C.A. (The National Guard Act), and the Indiana Constitution is the Act of the Indiana General Assembly of 1953, Chapter 187 (Burns' Indiana Statutes, Sections 45-1801 through 45-2805), known as the Indiana Military Code. This code demonstrates the relationship of the National Guard of Indiana and its members with the United States of America.

From the said Constitutions and the laws of the United States of America and the State of Indiana, it is clear that Major Layne had a dual legal relationship to the United States of America and to the State of Indiana at the times in question. Both Constitutions charge the National and State Government respectively with the power to create and maintain the Indiana National Guard and its personnel. The Indiana National Guard and its members may be what is termed in the active or inactive service of the respective National and State Governments. The fact that Major Layne and the Indiana Air National Guard at the time in question were in the service of the State, and such was termed "Active Service," does not mean that they had no active duty relationship or status with the United States of America even though such was termed "Inactive Service," they were in the service of the United States of America limited though it may be.

Major Layne was a commissioned officer who took an oath of office prescribed by both the national and state laws to support and defend the National Constitution against all enemies, foreign and domestic, bear true faith and allegiance to it, obey the orders of the President of the United States, and that he would well and faithfully discharge the duties of his office. Major Layne was at the time in question a part of the reserve components of the defendant's military establishment. Major Layne qualified for and received a regular pay allowance from the defendant under the said national laws. Title 31 U.S.C.A. 628. Major Layne was qualified for and his surviving dependents received the pension and other benefits under said national laws. Title 38 U.S.C.A. 101. With the foregoing factors and others prescribed in the said laws, it cannot be said that the term "Inactive Service" means that he was not in the service of the defendant at the time in question, even though he was at the time following the orders or command of the State of Indiana in his described dual relationship.

It was not the intention of the Congress of the United States of America to grant to a guardsman on inactive duty all of the benefits of a serviceman on active duty in the armed forces of the United States of America plus the rights of a civilian under the Federal Tort Claims Act. In view of the holding in the Feres case, supra, denying a serviceman performing on active duty with the armed forces of the United States of America the right to recover damages under the Federal Tort Claims Act, if the foregoing intention of Congress were otherwise, it would place a guardsman in a better position than the serviceman on active duty. Congress recognized the guardsmen as being in

the service of the United States of America as limited by said laws and provided for their well being by awarding and by appropriations for pay allowances, gratuities, and pensions.

Personnel in the military service are in an honored calling performing the highest duty to their country. Theirs is not that of the relationship of master and servant known in the civil law, although some of the fundamentals of the two may be compared. Their service is within the meaning of the words "any employee" as used in the Federal Tort Claims Act. Major Layne was a commissioned officer and took an oath of office as herein explained.

Plaintiff vigorously contends that Major Layne was in the "Inactive Service" of the United States of America and while in such status was not an employee of the United States of America at the time in question and, therefore, Major Layne or his surviving dependents are entitled to the remedy of the Federal Tort Claims Act. Plaintiff cites the following authorities: Williams v. United States (10th Cir., 1951), 189 F. (2d) 607; Dover v. United States (5th Cir., 1951), 192 F. (2d) 431; McCrannie v. United States (5th Cir., 1952), 199 F. (2d) 581, certiorari denied, 345 U. S. 922; Mackay v. United States (Dist. Ct. Conn., 1949), 88 F. Supp. 696; Glasgow v. United States (D. C. N. D. Ala., 1951), 95 F. Supp. 213. These authorities do not decide whether or not a guardsman on active or inactive duty of the United States of America may use the remedy of the Federal Tort Claims Act. Generally, these cases involve an injured civilian seeking the Federal Tort Claims Act remedy against the United States of America for the negligence of a guardsman on inactive duty proximately causing such injuries. They hold in accordance with the master and serv-

ant rule of respondeat superior that the United States of America under the facts of those cases is not responsible for the conduct of the alleged negligent guardsmen because they were under the command of a separate distinct master, the State, at the time of the happening and then and there executing such commands. Such authorities might be precedent for the law of the case if this action was by an injured civilian against the defendant for damages caused by the negligence of Major Layne in the operation of the plane. While the question of law in this case may be partially lurking in the records of the cited authorities, neither brought to the attention of those courts nor ruled upon, such do not constitute precedents to be followed. Webster v. Fall, 266 U. S. 507, 45 S. Ct. Rep. 148. These cases do not negate a guardsman's dual relationship.

We must keep in mind that in these cases the alleged master, United States of America, had done no wrong. Liability was sought to be fixed on the master for the wrongs of its alleged servant whom it did not control and which servant was not executing the orders of such master when the tort occurred. Even the states who were the masters of the guardsmen in question in those cases would not be obligated if the guardsmen's wrong was committed outside the scope of his employment with those states. It is possible, depending on the facts, for a guardsman to be performing several duties for both the State and the National Governments, the joint performance of which may be the proximate cause of an incident injuring another in which event both State and Nation would be liable, if immunity had been waived, or the performance of such for the State could be the proximate cause but the simultaneous performance of such for the Nation may not be the proximate cause, in

which event the State would be liable if immunity had been waived and the Nation would not be liable.

It is also apparent that a guardsman at a given time, despite his dual relationship, may be in exclusive service of the State. For example, when the State is utilizing the guard for purely State functions of maintaining the peace and tranquility of its citizens during riots, floods and disorders. A guardsman under such circumstances may not be performing in the line of duty for the Federal Government. However, there has been a chipping away of the doctrine of these cases because of the factual circumstances presented by unit caretakers and administrative assistants of non-activated National Guard Units, even though members of the guard, they have been held to be civilian employees of the United States within the meaning of the Tort Claims Act on the basis of direct federal control of their activities in such employment: United States v. Holly, 192 F. 2d 221; Elnro v. United States, 197 F. 2d 230; United States v. Wendt, 242 F. 2d 854; Watt v. United States, 123 F. Supp. 106. The case of Courtney v. United States, 230 F. 2d 112, involved a unit caretaker conceded to be a federal employee although being hired by the state who controlled his rate of pay and hours of work. Judge Hinks, Second Circuit Judge, in speaking for the majority stated:

> "Whether he was an 'employee of the government' is wholly a federal question based on federal statutory interpretation. 28 U.S.C.A. 1346(b), 2671. Consequently his status under New York law is irrelevant. Moreover, we know of no rule of law that service to federal and state government is incompatible or that one cannot be an 'employee' for some and not for other purposes."

In this case, Major Layne at the time in question was performing limited service of the United States of America

in a military status even though he was also executing at the same time the commands of the State of Indiana; received pay from the United States of America for the training flight in question even though he was executing at the same time the commands of the State of Indiana; operated a jet plane of the United States of America and at the time in question had the direct duty to the United States of America to safeguard such plane even though he was executing at the same time the commands of the State of Indiana; and his dependent survivors received pensions and other benefits by reason of his death occurring in a service-connected accident even though he was executing at the same time the commands of the State of Indiana. Under the said laws, Major Layne was not in the same non-service status with the United States of America as that of a non-military private citizen of this country. The fact that the United States of America was not exercising its entire power of command or control of Major Layne at the time in question does not remove or destroy the performance of service for, and the status relationship the Major had with the United States of America, or it with the Major at the time in question. Nor does the fact that Major Layne's status is termed "Inactive Service" mean that he is not in or performing any service. The whole law must be read together to ascertain the meaning of such term which unerringly points to the service status of Major Layne and that in the line of duty, under these facts, was injured and became a casualty incident to such service with the United States of America.

Major Layne's accident occurred in the line of duty and incident to his service with the United States of America, therefore the holding in the case of Brooks v. United States

of America, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200, cited by the plaintiff is not authority for this case. Feres v. United States of America, supra; Richard W. Buer v. United States of America, 241 F. 2d 3.

A reading of the entire laws in question points to the meaning of "Inactive Service" as actually being an active relationship between Major Layne and the United States of America as limited by his duties to the State at the time in question. For example: the plane which he was operating was the property of the defendant, Title 32 U.S.C.A. 710(a); if the plane was damaged through the negligence of Major Layne, he would have been obligated to reimburse the defendant from his military service pay by reason of the provisions of Title 32 U.S.C.A. 710 quoted in part with emphasis added:

> "Section 710 Reports of Survey.
>
> * * *
>
> (c) * * *. However, if it was lost, damaged, or destroyed through negligence, the money value of the property or the damage thereto shall be charged * * *; or (2) to the member to whom the loss, damage, or destruction is charged from *pay due him for duties performed in his status as a member of the National Guard.*
>
> * * *."

The italicized portion of the quoted status refers to the many duties placed upon Major Layne under the said laws as limited by his separate duties to the State of Indiana. "The pay due him," referred to in the italicized portion of the quoted statute, is the pay Major Layne received from the United States of America as compensation for his performance of said duties prescribed by the United States of America. It is unreasonable to suggest that the training of a

jet aircraft pilot, such as Major Layne, or the use of the jet aircraft in question, would be useful to the accomplishment of any mission for the State of Indiana, but solely for the United States of America's military establishment. The training flight of Major Layne involved a distinct relationship with and performance of a duty to the United States of America.

Major Layne was in the performance of military service of the United States of America as limited by said laws at the time in question and is precluded from the remedies of the Federal Tort Claims Act. Feres v. United States of America, supra, Richard W. Buer v. United States of America, supra.

This opinion is restricted to a consideration solely of the relationship of Major Layne to the Federal Government at the time of the training accident and any reference to other factual situations or circumstances have merely been hypothecated for this purpose and there has been no effort made to determine other relationships which Major Layne or any National Guardsmen for that matter might occupy at any given time.

The defendant is entitled to a judgment as a matter of law as the plaintiff has no cause of action under the Federal Tort Claims Act on the facts of this case. The Motion for Summary Judgment is sustained.

JUDGMENT
OF THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

October 16, 1961

Before

Hon. John S. Hastings, Chief Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

28 U. S. C. Sec. 1346 (b):

> "(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. Sec. 2674. *Liability of the United States:*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

10 U.S.C. Sec. 8079. *Air National Guard of United States: Status when not in Federal service:*

"When not on active duty, members of the Air National Guard of the United States shall be administered, armed, equipped, and trained in their status as members of the Air National Guard. Aug. 10, 1956, c. 1041, 70 A. Stat. 496."

10 U.S.C. Sec. 8495. *Air National Guard of United States: status*

"Members of the Air National Guard of the United States are not in active Federal service except when ordered thereto under law. Aug. 10, 1956, c. 1041, 70 A. Stat. 524."

10 U.S.C. Sec. 8499. *Air National Guard in Federal Service: status*

"Members of the Air National Guard called into Federal service are, from the time when they are required

to respond to the call, subject to the laws and regulations governing the Air Force, except those applicable only to members of the Regular Air Force. Aug. 10, 1956, c. 1041, 70 A. Stat. 525."

32 U.S.C. Sec. 101. *Definitions:*

"In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

* * *.

"(2) 'Armed forces' means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

* * *.

"(6) 'Air National Guard' means that part of the organized militia of the several States and Territories, Puerto Rico, the Canal Zone, and the District of Columbia, active and inactive that

"(A) is an air force;

"(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

"(C) is organized, armed, and equipped wholly or partly at Federal expense; and

"(D) is federally recognized.

"(7) 'Air National Guard of the United States' means the reserve component of the Air Force all of whose members are members of the Air National Guard.

* * *.

"(12) 'Active duty' means full-time duty in the active military service of the United States. It includes such Federal duty as duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school

designated as a service school by law or by the Secretary of the military department concerned.

"• • •.

"Aug. 10, 1956, c. 1041, 70A Stat. 596; Sept. 2, 1958, Pub. L. 85-861, Sec. 2(1), 72 Stat. 1542."

32 U.S.C. Sec. 301. *Federal recognition of enlisted members*

"To be eligible for Federal recognition as an enlisted member of the National Guard, a person must have the qualifications prescribed by the Secretary concerned for the grade, branch, position, and type of unit or organization involved. He becomes federally recognized upon enlisting in a federally recognized unit or organization of the National Guard. Aug. 10, 1956, c. 1041, 70A Stat. 601."

32 U.S.C. Sec. 715. *Property loss; personal injury or death: activities under certain sections of this title*

"(a) Under such regulations as the Secretary of the Army or Secretary of the Air Force may prescribe, he or, subject to appeal to him, the Judge Advocate General of the armed force under his jurisdiction, if designated by him, may settle, and pay in an amount not more than $5,000 a claim against the United States for—

"(1) Damage to, or loss of, real property, including damage or loss incident to use and occupancy.

"(2) damage to, or loss of, personal propery, including property bailed to the United States or the National Guard and including registered or insured mail damaged, lost, or destroyed by a criminal act while in the possession of the National Guard; or

"(3) personal injury or death;

either caused by a member of the Army National Guard or the Air National Guard, as the case may be, while engaged in training or duty under section 316, 502, 503, 504, or 505 of this title or any other provision of law for which he is entitled to pay under section 301 of title 37, or for which he has waived that pay, and acting within the scope of his employment; caused by a person employed under section 709 of this title acting within the scope of his employment; or otherwise incident to noncombat activities of the Army National Guard or the Air National Guard, as the case may be, under one of those sections.

"(b) A claim may be allowed under subsection (a) only if—

"(1) it is presented in writing within two years after it accrues, except that if the claim accrues in time of war or armed conflict or if such a war or armed conflict intervenes within two years after it accrues, and if good cause is shown, the claim may be presented not later than two years after the war or armed conflict is terminated;

"(2) it is not covered by section 2734 of title 10 or section 2672 of title 28;

"(3) it is not for personal injury or death of such a member or a person employed under section 709 of this title, whose injury or death is incident to his service;

"(4) the damage to, or loss of, property, or the personal injury or death, was not caused wholly or partly by a negligent or wrongful act of the claimant, his agent, or his employee; and

"(5) it is substantiated as prescribed in regulations of the Secretary concerned.

"For the purposes of clause (1), the dates of the beginning and end of an armed conflict are the dates established by concurrent resolution of Congress or by a determination of the President.

"(c) Payment may not be made under this section for reimbursement for medical, hospital, or burial services furnished at the expense of the United States or of any State or the District of Columbia or Puerto Rico.

"(d) If the Secretary of the military department concerned considers that a claim in excess of $5,000 is meritorious and would otherwise be covered by this section, he may pay the claimant $5,000 and report the excess to Congress for its consideration.

"(e) Except as provided in subsection (d), no claim may be paid under this section unless the amount tendered is accepted by the claimant in full satisfaction.

"(f) In any case where the amount to be paid is not more than $1,000, the authority contained in subsection (a) may be delegated to any officer of the Army or the Air Force, as the case may be, who has been delegated authority under section 2733(g) of title 10 to settle similar claims.

"(g) Notwithstanding any other provision of law, the settlement of a claim under this section is final and conclusive.

"(h) In this section, 'settle' means consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or disallowance. Added Pub. L. 86-740, Sec. 1(1), Sept. 13, 1960, 74 Stat. 878."

38 U.S.C. Sec. 331. *Basic entitlement.*

"For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122."

38 U.S.C. Sec. 401. *Definitions*

"As used in this chapter—

"(1) The term 'basic pay' means the monthly pay prescribed by sections 232(a), 232(c), or 308 of Title 37, as may be appropriate, for a member of a uniformed service on active duty.

"(2) The term 'veteran' includes a person who died in the active military, naval, or air service. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1126."

38 U.S.C. Sec. 416. *Dependency and indemnity compensation in cases of prior deaths.*

"• • •

"(b)(1) Whenever the widow of a veteran has been granted dependency and indemnity compensation by reason of this section, payments to her and to the children of the veteran shall thereafter be made under this chapter, and shall not thereafter be made to them by reason of the death of the veteran under (A) other provisions of law administered by the Veterans' Ad-

ministration providing for the payment of compensation or pension, or (B) the Federal Employees' Compensation Act.

"(2) Whenever the child or parent of any veteran is granted dependency and indemnity compensation, payments shall not thereafter be made to such child or parent by reason of the death of the veteran under (A) other provisions of law administered by the Veterans' Administration providing for the payment of compensation or pension, or (B) the Federal Employees' Compensation Act."

38 U.S.C. Sec. 417. *Restriction on payments under this chapter*

"(a) No dependency and indemity compensation shall be paid to the widow, children, or parents of any veteran dying after April 30, 1957, having in effect at the time of death a policy of United States Government life insurance or National Service Life Insurance under waiver of premiums under section 724 of this title, unless waiver of premiums on such policy was granted pursuant to the first proviso of section 622(a) of the National Service Life Insurance Act of 1940, and the death occurs before the veteran's return to military jurisdiction or within one hundred and twenty days thereafter. Where dependency and indemnity compensation is not payable by reason of the preceding sentence, death compensation may be paid under section 321 or 341 of this title, as applicable.

"(b) No person eligible for dependency and indemnity compensation by reason of any death occurring after December 31, 1956, shall be eligible by reason of such death for any payments under (1) provisions of law administered by the Veterans' Administration providing for the payment of death compensation or death pension, or (2) the Federal Employees' Compensation Act. Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1132."

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

The motion of the defendant for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure having been presented, all responsive pleadings thereto having been filed, oral argument thereon having been had, supplemental briefs of the parties having been filed, and the Court being fully advised in the premises.

The Court finds that the defendant is entitled to a summary judgment as a matter of law.

It is Therefore Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiff have and recover nothing by her suit, that costs herein be assessed against the plaintiff.

ENTRY OF THE UNITED STATES DISTRICT COURT

March 2, 1961

The plaintiff's Motion to Alter or Amend Judgment And For A New Trial is denied in view of the memorandum opinion sustaining defendant's Motion for Summary Judgment.

This being a Summary Judgment Proceeding, the Court could not weigh the evidence to determine whether or not the proximate cause of the accident was the result of the alleged negligence of the defendant's civilian airport personnel or the preceding blownout tire on the aircraft.

Major Layne's injuries and resultant death were a direct result of an incident of his service as a National Guardsman to the United States of America. He was under orders to

comply with all airport control and directions in the operation of the National Guard F-84-F type Jet. By order of the Commander of the Air Force, all military personnel were obligated to shift all matters of air navigational control to Federal civilian authorities who are also under command of the President of the United States of America.

Inasmuch as such civilian control over military aircraft was ordered and Major Layne was obeying the orders of his superiors, such control could only be incident to his service. Both the military personnel and the civilian authorities have the same master, the President of the United States of America or his delegates. Feres v. United States (1950), 340 U. S. 135, 95 L. Ed. 152, is authority for the Court's ruling denying plaintiff relief for damages incurred incident to military service.